

INDEX

| | Page |
|-----------------------------------------------------------------------------------------------------|------|
| Opinions below..... | 1 |
| Jurisdiction..... | 1 |
| Questions presented..... | 2 |
| Statutes and regulations involved..... | 3 |
| Statement..... | 3 |
| Summary of argument..... | 5 |
| Argument: | |
| I. The jurisdiction of the Court to grant the petition for rehearing..... | 7 |
| II. The penalty for failure to file the personal holding company return was correctly assessed..... | 28 |
| Conclusion..... | 46 |
| Appendix..... | 47 |

CITATIONS

Cases:

| | |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| <i>Alkire, John D., Inv. Co. v. Nicholas</i> , 114 F. 2d 607..... | 39 |
| <i>A. F. of L. v. Labor Board</i> , 308 U. S. 401..... | 13 |
| <i>Art Metal Construction Co. v. United States</i> , certiorari denied, 283 U. S. 863, rehearing denied, 289 U. S. 706..... | 22 |
| <i>Atterbury v. United States</i> , 59 F. 2d 300..... | 44 |
| <i>Bankers Coal Co. v. Burnet</i> , 287 U. S. 308..... | 24 |
| <i>Beam v. Hamilton</i> , 289 Fed. 9..... | 43 |
| <i>Blenheim Co. v. Commissioner</i> , 125 F. 2d 906..... | 40 |
| <i>Bowman v. Loperena</i> , 311 U. S. 262..... | 22 |
| <i>Brooks v. Railroad Co.</i> , 102 U. S. 107..... | 22 |
| <i>Burnet v. Lexington Ice & Coal Co.</i> , 62 F. 2d 906..... | 23 |
| <i>Bushnell v. Crooke Min. & Smelting Co.</i> , 150 U. S. 82..... | 22 |
| <i>Calafato v. Commissioner</i> , 124 F. 2d 187..... | 45 |
| <i>Cemi Securities Corp. v. Commissioner</i> , 72 F. 2d 295, certiorari denied, 293 U. S. 613..... | 39 |
| <i>Chicago G. W. R. R. Co. v. Basham</i> , 249 U. S. 164..... | 21 |
| <i>Citizens Bank vs Opperman</i> , 249 U. S. 118..... | 21 |
| <i>Colgate-Palmolive-Peet Co. v. United States</i> , Nos. 38 and 39, this Term, certiorari denied, May 24, 1943, rehearing and certiorari granted June 14, 1943..... | 17 |
| <i>Commissioner v. Kucin Chain Co.</i> , 72 F. 2d 124..... | 39 |
| <i>Commissioner v. National Lard & Coast Co.</i> , 70 F. 2d 349..... | 44 |
| <i>Crane-Johnson Co. v. Commissioner</i> , certiorari denied, 308 U. S. 627, rehearing and certiorari granted, 309 U. S. 692..... | 15 |

Cases—Continued.

| | Page |
|-----------------------------------------------------------------------------------------------------------------------------------------------|---------------|
| <i>Denholm & McKay Co. v. Commissioner</i> , 132 F. 2d 243..... | 23 |
| <i>Douglas v. Willcuts</i> , certiorari denied, 293 U. S. 626, rehearing and certiorari granted, 295 U. S. 722..... | 17 |
| <i>Duquesne Steel Foundry Co. v. Burnet</i> , certiorari denied, 282 U. S. 878, rehearing and certiorari granted, 282 U. S. 830..... | 18 |
| <i>Edmonds v. Commissioner</i> , 90 F. 2d 14, certiorari denied, 302 U. S. 713..... | 45 |
| <i>Fidelity & Columbia T. Co. v. Commissioner</i> , 90 F. 2d 219, certiorari denied, 302 U. S. 723..... | 45 |
| <i>Florsheim Bros. Co. v. United States</i> , 280 U. S. 453..... | 38 |
| <i>Germantown Trust Co. v. Commissioner</i> , 309 U. S. 304. 38, 40, 41, 42 | |
| <i>Girard Inv. Co. v. Commissioner</i> , 122 F. 2d 843, certiorari denied, 314 U. S. 699..... | 33, 40 |
| <i>Griffiths v. Commissioner</i> , 50 F. 2d 782..... | 23 |
| <i>Group No. 1 Oil Corp. v. Bass</i> , certiorari denied, 282 U. S. 877, rehearing and certiorari granted, 282 U. S. 830..... | 17 |
| <i>Helvering v. Cement Investors, Inc.</i> , certiorari denied, 315 U. S. 802, rehearing and certiorari granted, 315 U. S. 825..... | 18 |
| <i>Helvering v. James Q. Newton Trust</i> , certiorari denied, 315 U. S. 803, rehearing and certiorari granted, 315 U. S. 825..... | 18 |
| <i>Helvering v. Mitchell</i> , 303 U. S. 391..... | 36 |
| <i>Helvering v. Northern Coal Co.</i> , 293 U. S. 191..... 5, 10, 14, 19 | |
| <i>Helvering v. Sprouse</i> , certiorari denied, 315 U. S. 810, rehearing denied, 315 U. S. 831, certiorari granted, 316 U. S. 656..... | 19 |
| <i>La Floridienne J. Buttgenbach & Co. v. Commissioner</i> , 63 F. 2d 630..... | 24 |
| <i>Lane-Wells Co. v. Commissioner</i> , 43 B. T. A. 463, 134 F. 2d 977, No. 115, this Term..... | 32, 40 |
| <i>Logan Coal & Timber Ass'n v. Helvering</i> , 122 F. 2d 848..... | 33, 40, 45 |
| <i>Lone Pine Lawn Corp. v. Helvering</i> , 121 F. 2d 935..... | 33, 40, 45 |
| <i>McDonnell v. United States</i> , 59 F. 2d 295, certiorari denied, 287 U. S. 648..... | 44 |
| <i>Monjar v. Higgins</i> , 132 F. 2d 990..... | 24 |
| <i>National Contracting Co. v. Commissioner</i> , 105 F. 2d 488..... | 39, 45 |
| <i>National Shirt Shops v. United States</i> , 57 F. 2d 925, certiorari denied, 287 U. S. 633..... | 39 |
| <i>Neuberger v. Commissioner</i> , certiorari denied, 308 U. S. 623, rehearing and certiorari granted, 310 U. S. 655..... | 18 |
| <i>Northern Pacific Railroad v. Holmes</i> , 155 U. S. 137..... | 21 |
| <i>Noteman v. Welch</i> , 108 F. 2d 206..... | 33, 40 |
| <i>Ohio Pub. Serv. Co. v. Fritz</i> , 274 U. S. 12..... | 21 |
| <i>Old Colony Tr. Co. v. Commissioner</i> , 279 U. S. 716..... | 11, 15 |
| <i>O'Sullivan Rubber Co. v. Commissioner</i> , 120 F. 2d 845..... | 33, 40, 45 |

III

Cases—Continued.

| | Page |
|----------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| <i>Paramount Publix Corp. v. American Tri-Ergon Corp.</i> , certiorari denied, 293 U. S. 587, rehearing and certiorari granted, 293 U. S. 528..... | 17 |
| <i>Paso Robles Mercantile Co. v. Commissioner</i> , 33 F. 2d 653, certiorari denied, 280 U. S. 595..... | 39 |
| <i>Pfister v. Finance Corp.</i> , 317 U. S. 144..... | 22 |
| <i>Plunkett v. Commissioner</i> , 118 F. 2d 644..... | 45 |
| <i>Porto Rico Coal Co. v. Commissioner</i> , 126 F. 2d 212..... | 33, 40 |
| <i>Query v. United States</i> , certiorari denied, 314 U. S. 685, order vacated and certiorari granted, 316 U. S. 653..... | 18 |
| <i>Rochester Tel. Corp. v. United States</i> , 307 U. S. 125..... | 13 |
| <i>Roberts Sash & Door Co. v. United States</i> , certiorari denied, 282 U. S. 838, rehearing and certiorari granted, 282 U. S. 829..... | 17 |
| <i>Rowan Cotton Mills v. Commissioner</i> , T. C. 865..... | 32 |
| <i>Sanitary Refrigerator Co. v. Winters</i> , certiorari denied, 278 U. S. 599; rehearing and certiorari granted, 278 U. S. 587..... | 17 |
| <i>Scranton-Lackawanna T. Co. v. Commissioner</i> , 80 F. 2d 519; certiorari denied, 297 U. S. 723..... | 45 |
| <i>Smith, John Thomas v. Commissioner</i> , 42 B. T. A. 505, reversed on other grounds, 136 F. 2d 556..... | 24 |
| <i>Swall v. Commissioner</i> , 122 F. 2d 324, certiorari denied, 314 U. S. 697..... | 23 |
| <i>Sweet v. Commissioner</i> , 120 F. 2d 77..... | 22 |
| <i>Texas & Pacific Railway Co. v. Murphy</i> , 111 U. S. 488..... | 21 |
| <i>Uhl Estate Co. v. Commissioner</i> , 116 F. 2d 403..... | 45 |
| <i>United States v. Ellicott</i> , 223 U. S. 524..... | 21 |
| <i>United States v. Hudson</i> , 299 U. S. 498..... | 31 |
| <i>United States v. National Tank and Export Co.</i> , 45 F. 2d 1005, certiorari denied, 283 U. S. 839..... | 39 |
| <i>United States v. Seminole Nation</i> , 299 U. S. 417..... | 21 |
| <i>Urdike v. United States</i> , 8 F. 2d 913, certiorari denied, 271 U. S. 661..... | 44 |
| <i>Wayne Gas Co. v. Owens Co.</i> , 300 U. S. 131..... | 22 |
| <i>Will County Title Co. v. Commissioner</i> , 38 B. T. A. 1396..... | 32 |

Statutes:

| | |
|-----------------------------------------------------------------------------------------------------|------------|
| Act of October 3, 1917: | |
| Sec. 201..... | 43 |
| Sec. 212..... | 43 |
| Act of February 13, 1925, c. 229, 43 Stat. 936, Sec. 8 (U. S. C. 1940 ed., Title 28, Sec. 350)..... | 21 |
| Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544: | |
| Sec. 25 (U. S. C. 1940 ed., Title 11, Sec. 48)..... | 21 |
| Sec. 39 (U. S. C. 1940 ed., Title 11, Sec. 67)..... | 21 |
| Internal Revenue Code: | |
| Sec. 271 (U. S. C. 1940 ed., Title 26, Sec. 271)..... | 3 |
| Sec. 272 (U. S. C. 1940 ed., Title 26, Sec. 272)..... | 12, 24, 25 |

IV

Statutes—Continued.

Internal Revenue Code—Continued.

| | Page |
|----------------------------------------------------------------------|-------------------------------------------------------|
| Sec. 273 (U. S. C. 1940 ed., Title 26, Sec. 273)..... | 25 |
| Sec. 275 (U. S. C. 1940 ed., Title 26, Sec. 275)..... | 24 |
| Sec. 277 (U. S. C. 1940 ed., Title 26, Sec. 277)..... | 25 |
| Sec. 322 (U. S. C. 1940 ed., Title 26, Sec. 322)..... | 12, 26, 27 |
| Sec. 506 (U. S. C. 1940 ed., Title 26, Sec. 506)..... | 33 |
| Sec. 871 (U. S. C. 1940 ed., Title 26, Sec. 871)..... | 25 |
| Sec. 872 (U. S. C. 1940 ed., Title 26, Sec. 872)..... | 25 |
| Sec. 874 (U. S. C. 1940 ed., Title 26, Sec. 874)..... | 25 |
| Sec. 875 (U. S. C. 1940 ed., Title 26, Sec. 875)..... | 25 |
| Sec. 1012 (U. S. C. 1940 ed., Title 26, Sec. 1012)..... | 25 |
| Sec. 1013 (U. S. C. 1940 ed., Title 26, Sec. 1013)..... | 25 |
| Sec. 1016 (U. S. C. 1940 ed., Title 26, Sec. 1016)..... | 25 |
| Sec. 1017 (U. S. C. 1940 ed., Title 26, Sec. 1017)..... | 25 |
| Sec. 1140 (U. S. C. 1940 ed., Title 26, Sec. 1140)..... | 5, 7, 9, 10, 12, 13, 14, 15, 16, 19, 22, 25, 27-47 |
| Sec. 1141 (U. S. C. 1940 ed., Title 26, Sec. 1141)..... | 11 |
| Sec. 1142 (U. S. C. 1940 ed., Title 26, Sec. 1142)..... | 11 |
| Sec. 1145 (U. S. C. 1940 ed., Title 26, Sec. 1145)..... | 25 |
| Judicial Code, Sec. 237 (U. S. C. 1940 ed., Title 28, Sec. 344)..... | 21 |
| Judicial Code, Sec. 240, as amended..... | 11 |
| Revenue Act of 1916, Title I..... | 43 |
| Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 900..... | 11 |
| Revenue Act of 1926, c. 27, 44 Stat. 9: | |
| Sec. 274..... | 12 |
| Sec. 277..... | 12 |
| Sec. 284..... | 12 |
| Sec. 1001..... | 11, 16, 26 |
| Sec. 1002..... | 11 |
| Sec. 1003..... | 11 |
| Sec. 1004..... | 11 |
| Sec. 1005..... | 10, 12, 15, 19, 22 |
| Revenue Act of 1932, c. 209, 47 Stat. 169: | |
| Sec. 13..... | 42 |
| Sec. 104..... | 29 |
| Secs. 161-162..... | 42 |
| Sec. 275..... | 38 |
| Sec. 1111..... | 38, 42 |
| Revenue Act of 1934, c. 277, 48 Stat. 680: | |
| Sec. 54..... | 32, 46 |
| Sec. 62..... | 32, 49 |
| Sec. 291..... | 4, 6, 7, 29, 33, 35, 44, 49 |
| Sec. 351..... | 4, 28, 31, 33, 34, 42, 43, 50 |
| Revenue Act of 1935, c. 829, 49 Stat. 1014: | |
| Sec. 405..... | 54 |
| Sec. 406..... | 4, 6, 7, 29, 33, 35, 44, 45, 52 |
| Revenue Act of 1936, c. 690, 49 Stat. 1648: | |
| Sec. 54..... | 53 |
| Sec. 62..... | 53 |

Statutes—Continued.

Page

Revenue Act of 1936, c. 690, 49 Stat. 1648—Continued.

Sec. 291----- 4, 6, 7-29, 33, 35, 44, 45, 52

Sec. 351----- 4, 28, 33, 34, 42, 43, 53

Revenue Act of 1938, c. 289, 52 Stat. 447, Sec. 407----- 33

Miscellaneous:

H. Conf. Rep. No. 1385, 73d Cong., 2d Sess., p. 20 (1939-1

Cum. Bull. (Part 2) 627, 631)----- 30

H. Rep. No. 1, 69th Cong., 1st Sess., p. 21 (1939-1 Cum.

Bull. (Part 2) 315, 329)----- 12

H. Rep. No. 179, 68th Cong., 1st Sess., pp. 7-8 (1939-1

Cum. Bull. (Part 2) 241, 246)----- 11

H. Rep. No. 704, 73d Cong., 2d Sess., p. 11 (1939-1 Cum.

Bull. (Part 2) 554, 562)----- 29

Robertson & Kirkham, *Jurisdiction of the Supreme Court
of the United States*, p. 522----- 18

Rules of the Supreme Court, Rule 33----- 7, 17, 18

S. Rep. No. 52, 69th Cong., 1st Sess., p. 38 (1939-1 Cum.

Bull. (Part 2) 332, 360)----- 12

S. Rep. No. 398, 68th Cong., 1st Sess., pp. 8-9 (1939-1

Cum. Bull. (Part 2) 266, 271)----- 11

S. Rep. No. 558, 73rd Cong., 2d Sess., pp. 13-15 (1939-1

Cum. Bull. (Part 2) 586, 596, 597)----- 30, 42

Treasury Regulations 86:

Art. 291-1----- 34, 53

Art. 351-1----- 54

Art. 351-8----- 33, 54

Treasury Regulations 94:

Art. 291-1, as amended----- 34, 55

Art. 351-1----- 56

Art. 351-8----- 33, 56

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 1

R. SIMPSON & Co., INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 25-30) is reported in 44 B. T. A. 498. The opinion of the circuit court of appeals (R. 49) is reported in 128 F. 2d 742.

JURISDICTION

The judgment of the circuit court of appeals affirming the decision of the Board of Tax Appeals was entered July 6, 1942 (R. 50). Petition for writ of certiorari was filed September 25, 1942. The petition was denied November 9, 1942. June

1, 1943, the petitioner filed with the Court motion for leave to file petition for rehearing out of time, together with the petition for rehearing. June 7, 1943, the Court granted the motion for leave to file and the petition for rehearing. On the same date it vacated its order of November 9, 1942, and granted certiorari limited to the second reason relied upon in the petition for the writ (R. 51). Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Does Section 1140 (b) (2) of the Internal Revenue Code deprive this Court of jurisdiction to grant a petition for rehearing of an order denying a petition for certiorari to review a judgment of the circuit court of appeals affirming a decision of the Board of Tax Appeals (now The Tax Court of the United States) ?

2. Where a corporation is held liable for personal holding company surtaxes for the years 1934, 1935 and 1936 under Section 351 of the Revenue Acts of 1934 and 1936, and the corporation failed to file for the years in question personal holding company returns, is the corporation subject to the 25% penalty provided by Section 291 of the Revenue Act of 1934, by Section 406 of the Revenue Act of 1935 and by Section 291 of the Revenue Act of 1936 ?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 47-56.

STATEMENT

The facts as found by the Board of Tax Appeals are as follows:

The taxpayer is a corporation under the laws of the State of New York (R. 26). In the years 1934, 1935, and 1936 it was engaged in the pawnshop business, lending money on personal property. During the years in question more than 50% of its capital stock was owned by less than five stockholders and more than 80% of its gross income was derived from interest. (R. 27.) For the years in question it filed complete income and excess profits tax returns on Form 1120 of the Treasury Department. Each form contained a question whether the corporation was a personal holding company within the meaning of Section 351 of the applicable Revenue Act and advised that, if it were, an additional return on Form 1120H was required. The taxpayer answered this question in the negative. (R. 27.) The taxpayer also filed information returns on Forms 1096 and 1099 of the Treasury Department, listing the amounts of dividends over \$300 paid to its stockholders for the years in question. The taxpayer's books and records gave some indication that more than 50% of its stock was owned by less than five stockholders and disclosed

that at least 80% of its income was derived from interest. These books and records were at all times available to the Commissioner and were actually made available to his agents during the audit of the taxpayer's income tax returns for the years in question. (R. 27-28.) The taxpayer did not file personal holding company returns on Form 1120H. The treasurer of the company, who executed its income tax returns, did not file the personal holding company returns because he thought the taxpayer was not a personal holding company within the meaning of Section 351. (R. 28.)

The Commissioner assessed personal holding company surtaxes for the years in question under Section 351 of the Revenue Acts of 1934 and 1936, and a 25% penalty for failure to file the personal holding company returns under Section 291 of the Revenue Acts of 1934 and 1936 and under Section 406 of the Revenue Act of 1935 (R. 8-16).

The Board of Tax Appeals affirmed the deficiencies and penalties so assessed (R. 28-30, 31). On petition for review, the Circuit Court of Appeals for the Second Circuit affirmed the decision of the Board (R. 49-50).

Petition for certiorari was denied by this Court November 9, 1942, but on motion by the taxpayer for leave to file petition for rehearing out of time, taxpayer's petition for rehearing was granted by the Court, June 7, 1943. The formal order denying certiorari was vacated and the petition for the writ granted, limited to the question of the pen-

alty assessments. The order also requested counsel to discuss the question of the jurisdiction of the Court to grant the petition for rehearing (R. 51).

SUMMARY OF ARGUMENT

I

The Government does not contest the jurisdiction of the Court to grant the petition for rehearing of its order denying the petition for certiorari. The answer to the question whether the Court had the power to grant the petition for rehearing depends upon the proper construction of Section 1140 (b) (2) of the Internal Revenue Code. That subsection provides that decisions of the Board of Tax Appeals shall become "final," where the circuit court of appeals has affirmed, upon "the denial of a petition for certiorari." *Helvering v. Northern Coal Co.*, 293 U. S. 191, apparently holds "final" to mean final in the sense that the decision of the Board may not thereafter be disturbed by the reviewing court. That case does not necessarily control here, however, since it dealt with another subsection of what is now Section 1140 which expressly limited to 30 days the period within which the Court might recall its mandate. Section 1140 provides no corresponding restriction as to orders denying certiorari. We suggest that "the denial of a petition for certiorari" may be construed so as to preserve to the Court its inherent power, during the same

term, to reconsider orders denying certiorari. So construed, the expression refers not to the action of the Court on certiorari in the first instance, but to its ultimate action during the same term.

II

The taxpayer is liable under Section 291 of the Revenue Acts of 1934 and 1936 and Section 406 of the Revenue Act of 1935 for the penalty assessed by the Commissioner for failure to file a personal holding company return on Treasury Department Form 1120H.

The Revenue Acts and authorized Treasury Department Regulations clearly required the filing of this return by the taxpayer. The taxpayer was not relieved of this duty by the circumstance that it did file Treasury Department Form 1120 for ordinary income and excess profits taxes, and Information Returns 1096 and 1099 disclosing its stockholders who received during the tax year dividends in excess of \$300. These returns did not notify the Commissioner that the taxpayer was a personal holding company or enable him to compute the tax. At most, they gave him a "lead." But Congress has not deemed a "lead" a sufficient return. The plain fact is that the taxpayer was required to file two distinct returns, on Forms 1120 and 1120H, and instead filed only the one, on Form 1120.

By Section 291 of the Revenue Act of 1934, and by Section 406 of the Revenue Act of 1935, the

assessment of the penalty for failure to file the return was mandatory. By Section 291 of the Revenue Act of 1936, the penalty for failure to file the return was excused if due to reasonable cause and not to willful neglect. The Board of Tax Appeals held, however, that the taxpayer had not shown that its failure to file the return was due to reasonable cause. This finding is proper and should be affirmed by this Court.

ARGUMENT

I

The jurisdiction of the Court to grant the petition for rehearing

The Government does not contest the Court's jurisdiction to grant a rehearing of the former order denying the petition for certiorari.

Absent a statutory prohibition, the Court clearly has the power during the same term to reconsider denials of certiorari, even though the 25-day period for rehearing provided by Rule 33 has expired (*infra*, pp. 17-18). Whether the Court has such power in the instant case, either within or without the 25-day period, depends upon the construction to be given Section 1140 (b) (2) of the Internal Revenue Code, which provides:

SEC. 1140. DATE WHEN BOARD DECISION BECOMES FINAL.

The decision of the Board shall become final—

* * * * *

(b) *Decision Affirmed or Petition for Review Dismissed.*—

* * * *

(2) *Petition for Certiorari Denied.*—

Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; * * *

Subsection (b) (2) presents only one of a variety of situations which are dealt with in Section 1140 (Appendix, *infra*, pp. 47-49). Although the provisions of this section are somewhat detailed, it seems advisable to note them at the outset:

After Board decision.—Under subsection (a), the decision of the Board of Tax Appeals (now the Tax Court) becomes “final” upon the expiration of the period allowed for the filing of a petition for review with a circuit court of appeals (defined to include the Court of Appeals for the District of Columbia), if no petition has been filed.

After circuit court of appeals decision.—Where a timely petition for review is filed with a circuit court of appeals, significance attaches in three differing situations to the event of the expiration of the period allowed for filing a petition for certiorari with this Court, if none has been filed, or, if a petition is filed, to the event of the denial of certiorari. Where the circuit court of appeals dismisses the petition for review or affirms the

Board's decision, then upon the happening of either of the events referred to, the Board decision becomes final, under (b) (2), quoted above, and (b) (1). Where the circuit court of appeals modifies or reverses the Board's decision, and either of the events referred to has occurred, then the decision of the Board rendered upon the court's mandate¹ becomes final after thirty days, unless within that period the parties move to correct it, in which case the Board's decision becomes final when so corrected, under (c) (2), (1) and (2). And where the circuit court of appeals remands the case to the Board for a rehearing, and either of the mentioned events transpires, then the decision of the Board rendered on the rehearing becomes final in the same manner as though there had been no prior decision, under (d) (1) and (2). From the foregoing it will be seen that, while significance is attributed to the denial of certiorari in three specified situations, only where the decision of the Board has been affirmed by the circuit court of appeals does the denial of certiorari render the Board decision "final."

After Supreme Court decision.—If the decision of this Court directs that the Board's decision be affirmed or the petition for review dismissed,

¹ Section 1140 (e) (2) defines "mandate," in case a mandate has been recalled prior to the expiration of 30 days from the date of its issuance, to mean the final mandate.

then the Board's decision becomes final thirty days after the issuance of this Court's mandate, under (b) (3). (This was the situation dealt with in *Helvering v. Northern Coal Co.*, 293 U. S. 191, which we discuss *infra*, pp. 19-20.) If this Court modifies or reverses the Board's decision, then the Board's decision rendered in accord with this Court's mandate becomes final after 30 days (subject to the same correctional provision as in the case of mandates of a circuit court of appeals) under (c) (1). If this Court orders a rehearing by the Board, then the Board's decision upon the rehearing, as in the case of rehearings ordered by a circuit court of appeals, becomes final as though there had been no prior decision, under (d). With like effect, subsections (c) (2) (3) and (d) (3) deal with the situations where the circuit court of appeals reverses the Board or orders a rehearing, and this Court affirms the circuit court of appeals.

Section 1140 derives from Section 1005 of the Revenue Act of 1926, c. 27, 44 Stat. 9. Prior to the Revenue Act of 1924, the only administrative review of income and estate tax assessments was by the Committee on Appeals and Review in the Office of the Commissioner of Internal Revenue. A wholly independent review could be obtained by the taxpayer only by payment of the tax and suit for refund against the United States or the appropriate collector of internal revenue.

To afford the taxpayer a review by an impartial body in advance of payment, the Board of Tax Appeals was established by Section 900 of the Revenue Act of 1924.² Under that Act, however, the decisions of the Board never became final in the sense of setting at rest the controversy. No direct judicial review of the Board's decisions was provided. The Commissioner could not assess any part of an amount disallowed as a deficiency by the Board, but, without assessment, he was free to sue for the collection of the claimed deficiency; likewise, a taxpayer was free to sue for the recovery of amounts paid pursuant to a Board decision. See *Old Colony Tr. Co. v. Commissioner*, 279 U. S. 716, 721-722. Sections 1001 to 1004 of the Revenue Act of 1926 (Sections 1141-1142, Internal Revenue Code) changed this situation by providing for direct review of the Board's decision by a circuit court of appeals, and upon certiorari pursuant to Section 240 of the Judicial Code, as amended, by this Court. Concomitantly, as to cases which went to the Board, the Commissioner, with exceptions not now material, was prohibited from making assessment, other than a jeopardy assessment, or collecting by distraint or by court proceeding, except in accordance with a decision of the Board which had be-

² See H. Rep. No. 179, 68th Cong., 1st Sess., pp. 7-8 (1939-1 Cum. Bull. (Part 2) 241, 246;) S. Rep. No. 398, 68th Cong., 1st Sess., pp. 8-9 (1939-1 Cum. Bull. (Part 2) 266, 271).

come "final" (Sec. 274 (a), (b), Revenue Act of 1926; Sec. 272, Internal Revenue Code). The running of the statute of limitations on assessment and collection was appropriately suspended during the period in which the Commissioner was forbidden to proceed (Sec. 277 (b), Revenue Act of 1926; Sec. 277, Internal Revenue Code). Taxpayer, on his part, was prohibited from suing for refund of taxes to which he was not entitled under a decision of the Board which had become "final" (Sec. 284, Revenue Act of 1926; Sec. 322, Internal Revenue Code). And for "final," as used in these and other sections, it was necessary to refer to Section 1005 of the Revenue Act of 1926—the present Section 1140 (Sec. 274 (h), Revenue Act of 1926; Sec. 272 (h), Internal Revenue Code). Thus, since 1926 the section providing the particular circumstances under which a decision of the Board becomes final has been enmeshed with other sections which specify the effect of that finality.

The reasons for such particularity as to the finality of the Board's decisions were set forth in substantially identical words in the House and Senate Committee Reports on the Revenue Bill of 1926 (H. Rep. No. 1, 69th Cong., 1st Sess., p. 21 (1939-1 Cum. Bull. (Part 2) 315, 329); S. Rep. No. 52, 69th Cong., 1st Sess., p. 38 (1939-1 Cum. Bull. (Part 2) 332, 360)). The House Report is as follows:

Court review—Finality of decisions.—Section 916 [Section 1005 as enacted] prescribes the date on which a decision of the Board (whether or not appeal thereon is had) is to become final. Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the Commissioner's determination, commences to run upon the day upon which the Board's decision becomes final, and inasmuch as the power to make a jeopardy assessment terminates upon the commencement of proceedings to review a decision of the Board, it is of utmost importance that this time be specified as accurately as possible. In some instances in order to achieve this result the usual rules of law applicable in court procedure must be changed. For example, the power of the court of review to recall its mandate is made to expire 30 days from the date of issuance of the mandate.

It is evident, of course, that the final decision referred to in Section 1140 carries with it more than the degree of finality required for purposes of appellate review. Cf. *Rochester Tel. Corp. v. United States*, 307 U. S. 125; *A. F. of L. v. Labor Board*, 308 U. S. 401. It might have been thought that a middle course in the construction of this section would have been justified. This would have construed "final", as used in Section 1140, to mean that a Board decision became final upon the occurrence of the events specified in that sec-

tion only in the sense that the decision of a lower court would become final in similar circumstances. On this view, the reviewing courts would retain power to exercise the traditional corrective processes, and the Commissioner and the taxpayer, in unusual situations, would simply be required to make final settlement of their accounts in the light of any action which either might have taken subsequent to the previous action of the reviewing courts. Any such middle course seems to be foreclosed, however, by the decision of this Court in *Helvering v. Northern Coal Co.*, *supra*. There it seems to have been held that "final," as used in Section 1140, means final in the sense that the Board decision may not thereafter be disturbed.

Consequently, unless the *Northern Coal* case were to be reexamined, the area of inquiry is limited to the meaning of "denial of a petition for certiorari", as used in subsection (b) (2). If this means that the Board decision becomes final upon the denial of certiorari in the first instance, the Court has lost jurisdiction of this case. But Congress did not undertake to define what should constitute the denial of a petition for certiorari, and since the matter relates exclusively to the practice of this Court, it would seem appropriate for the Court itself to determine when a petition is to be deemed denied. In the light of the Court's practice of reconsidering such petitions, and in harmony with the presumed purpose of Congress

to postpone collection of the taxes until all judicial remedies are exhausted, subsection (b) (2) may be properly construed to refer to the ultimate action of the Court on petition for certiorari rather than to its initial action. Such a construction would leave the Court free to conform the practice in Board cases to that followed generally, and to entertain petitions for reconsideration, or to vacate on its own motion a previous denial of certiorari, during the same Term. There is nothing in the statute to militate against this construction.

The policy underlying Section 1140.—The need for the particularity of Section 1005 of the Revenue Act of 1926 (the present Section 1140) is not entirely clear. The problem of the finality of judgments was by no means a new one and the courts over a long period had constructed a workable reconciliation of the competing interests favoring the repose of litigated issues, on the one hand, and the doing of complete justice, on the other. In any event, it seems clear that the framers of the 1926 Act fastened upon the certainty of the date upon which the Board's decision became final as the vital consideration, rather than upon haste in the final determination of cases coming before the Board. There was no disposition to limit a complete judicial review of Board decisions; indeed, the "chief change made by the Act of 1926 was the provision for direct judicial

review" (*Old Colony Tr. Co. v. Commissioner*, 279 U. S. at p. 722). It would seem significant that the time limits expressly stated in Section 1140 are applicable only after the particular court referred to, or the Board after court review, has decided the merits of the case. Thus, the 30-day limitation for recall of mandates, under (b) (3), and, by force of (e) (2), also under (c) (1), (2), and probably (d), can apply only where the court issuing the mandate has decided the case on review. The same is true of the 30-day limitation for the correction of a Board decision rendered upon the mandate of this Court or a circuit court of appeals, under (c) (1) and (c) (2). In contrast to these provisions, no express limitation is placed upon the period during which the Board may hold a case in the first instance; the power of the Board to reconsider and vacate its own decisions, at least prior to review; or the procedure before the Board on a rehearing.³

With respect to the denial of certiorari, likewise, no express limitation is provided barring reconsideration of the action taken by this Court in the first instance. The dominant policy of the 1926 Act—to provide certainty as to when Board decisions become final—need not be defeated by permitting a period for reconsideration, so long only as the date of finality of the Board decision

³ It may also be noted that under Section 1001 (a) of the Revenue Act of 1926, the losing party before the Board was allowed *six* months within which to file a petition for review.

may still be ascertained with certainty. A just result and the incidents of a complete judicial review might well be thought to require that "denial" of certiorari be so construed as to permit of a period for reconsideration. In this light, the following further considerations would seem relevant to a proper construction of subsection (b) (2).

The practice of the Court.—We have referred to the practice of the Court generally in reconsidering orders denying certiorari. Supreme Court Rule 33, providing for petitions for rehearing within 25 days after judgment, or subsequently thereto on order of the Court, has been applied to petitions for rehearing of orders denying petitions for certiorari. *Colgate-Palmolive-Peet Co. v. United States*, Nos. 38 and 39, this Term, certiorari denied, May 24, 1943, rehearing and certiorari granted, June 14, 1943; *Sanitary Refrigerator Co. v. Winters*, certiorari denied, 278 U. S. 599, rehearing and certiorari granted, 278 U. S. 587; *Roberts Sash & Door Co. v. United States*, certiorari denied, 282 U. S. 838, rehearing and certiorari granted, 282 U. S. 829; *Group No. 1 Oil Corp. v. Bass*, certiorari denied, 282 U. S. 877, rehearing and certiorari granted, 282 U. S. 830; *Paramount Publix Corp. v. American Tri-Ergon Corp.*, certiorari denied, 293 U. S. 587, rehearing and certiorari granted, 293 U. S. 528; *Douglas v. Willcuts*, certiorari denied, 293 U. S. 626, rehear-

ing and certiorari granted, 295 U. S. 722. And *Query v. United States*, certiorari denied, 314 U. S. 685, order vacated and certiorari granted, 316 U. S. 653, is a case where the Court on its own motion reconsidered an order denying certiorari entered several months previously. See *Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States*, p. 552.

Moreover, the following cases fall within the purview of subsection (b) (2): *Duquesne Steel Foundry Co. v. Burnet*, certiorari denied, 282 U. S. 878, rehearing and certiorari granted, 282 U. S. 830; *Neuberger v. Commissioner*, certiorari denied, 308 U. S. 623, rehearing and certiorari granted, 310 U. S. 655; *Crane-Johnson Co. v. Commissioner*, certiorari denied, 308 U. S. 627, rehearing and certiorari granted, 309 U. S. 692; *Helvering v. Cement Investors, Inc.*, certiorari denied, 315 U. S. 802, rehearing and certiorari granted, 315 U. S. 825; and *Helvering v. James Q. Newton Trust*, certiorari denied, 315 U. S. 803, rehearing and certiorari granted, 315 U. S. 825. These cases present a situation identical with that of the instant case—the Board's decision had been affirmed by the circuit court of appeals and a petition for certiorari was granted after once having been denied—except that the motions for reconsideration of the denial of the writ were filed within the 25-day period provided by Rule 33, and the question of the power of the Court to vacate its former order apparently was not

brought to the Court's attention. The instant case is the only one which we have discovered where a petition to reconsider a denial of certiorari to review the circuit court's affirmance of a Board decision was filed beyond the 25-day period.

In *Helvering v. Sprouse*, certiorari denied, 315 U. S. 810, rehearing denied, 315 U. S. 831, certiorari granted, 316 U. S. 656, the Court after denying the petition for certiorari and the petition for rehearing, later on its own motion vacated its former order of denial and granted the writ. In this case the circuit court of appeals had reversed or modified the decisions of the Board of Tax Appeals and therefore subsection (c) (2), and not subsection (b) (2), of the Internal Revenue Code was involved. The case is analogous, however, since (c) (2), like (b) (2), attaches significance to a denial of certiorari. Together with the cases cited in the preceding paragraph, it indicates the practice heretofore followed in respect to rehearings of orders denying certiorari, even where decisions of the Board of Tax Appeals are involved.

Helvering v. Northern Coal Co., *supra*, did not involve any of the subsections which deal with the effect of a denial of certiorari. That case involved Section 1005 (a) (4) of the Revenue Act of 1926 (now Section 1140 (b) (3), Internal Revenue Code), which provided that the Board's

decision should become final "upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court." In that case the circuit court of appeals had affirmed the decision of the Board of Tax Appeals and this Court, the Justices being evenly divided, had affirmed the circuit court of appeals and issued its mandate. Later in the same term of the Court, the Commissioner, by reason of an intervening decision of the Court, requested a rehearing arguing in support of the petition that in spite of the statute the Court still retained, according to its existing practices and inherent judicial powers, jurisdiction to vacate its judgment and mandate. The Court, however (p. 193), "in view of the authoritative and explicit requirement of the statute" denied the petition for rehearing. For the reasons already stated, it is believed that this decision does not necessarily control the present case. The subsection there involved specifically fixed "30 days from the date of issuance of the mandate of the Supreme Court" as the date on which the decision of the Board should become final. Thus the Court is specifically limited to thirty days in which it may reconsider its judgment and recall the mandate. Subsection (b) (2), however, contains no similar time limit for the reconsideration of orders denying certiorari. Accordingly, in such cases there is no statutory impediment to the view that the petition should not be deemed

denied so long as the Court retains authority over its order.

By way of analogy, attention is drawn to the interpretation given by this Court to statutes governing appellate jurisdiction. Judicial Code, Section 237, as amended, provides that under specified circumstances "a final judgment or decree in any suit in the highest courts of a state in which a decision in the suit could be had * * * may be reviewed by the Supreme Court upon appeal" (U. S. C. 1940 ed., Title 28, Sec. 344). The Act of February 13, 1925, c. 229, 43 Stat. 936, Section 8 (a) (U. S. C. 1940 ed., Title 28, Sec. 350) provides that no appeal or writ of certiorari shall be allowed or entertained unless application therefor be made within three months after the entry of the judgment or decree sought to be reviewed. Under these provisions, it is held that a judgment or decree, although final in form, is not subject to review or does not commence the running of the three months' period if a petition for rehearing or a motion for a new trial is seasonably filed and entertained. See *Chicago G. W. R. R. Co. v. Basham*, 249 U. S. 164, 167; *Citizens Bank v. Opperman*, 249 U. S. 448; *Ohio Pub. Service Co. v. Fritz*, 274 U. S. 12, 13; *United States v. Seminole Nation*, 299 U. S. 417, 421; *Texas & Pacific Railway Co. v. Murphy*, 111 U. S. 488, 489; *Northern Pacific Railroad v. Holmes*, 155 U. S. 137, 138; *United States v. Ellicott*, 223 U. S. 524, 539. For similar holdings under Sections 25 (a) and 39 (c) of the Bank-

ruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, as amended (U. S. C. 1940 ed., Title 11, Secs. 48 (a) and 67 (c)), see *Wayne Gas Co. v. Owens Co.*, 300 U. S. 131; *Bowman v. Loperena*, 311 U. S. 262, 266; *Pfister v. Finance Corp.*, 317 U. S. 144, 149.

Other cases.—*Sweet v. Commissioner*, 120 F. 2d 77 (C. C. A. 1st), involved Section 1005 (a) (3) of the Revenue Act of 1926 (which was identical with Section 1140 (b) (2) of the Internal Revenue Code), although on the facts the case was quite different from the instant case. There the circuit court of appeals had affirmed an order of the Board and this Court had denied certiorari. At the following term, this Court rendered a decision in another case claimed to be contrary to the decision of the circuit court of appeals, and the taxpayer thereupon moved that court for leave to file a motion with the Board to review its former decision. In these circumstances, quite apart from the statute, the case had become final so far as this Court was concerned, since it is held that the Court has no jurisdiction to entertain petitions for reconsideration filed subsequent to the end of the term at which the judgment or order for which reconsideration is sought was entered (*Brooks v. Railroad Co.*, 102 U. S. 107; *Bushnell v. Crooke Min. & Smelting Co.*, 150 U. S. 82; *Art Metal Construction Co. v. United States*, 283 U. S. 863, 289 U. S. 706). In the *Sweet* case, the circuit court of appeals based its decision denying the taxpayer's motion on Section 1005 (a)

(3) of the Revenue Act of 1926, commenting (p. 79) that the subsection fitted "the case at bar like a glove." It is nevertheless interesting to notice that the circuit court of appeals was in doubt (p. 80) as to whether under the statute the Board's decision became final within the 25 days after the entry of the order denying certiorari, the court commenting that during that period "the Supreme Court by its rules, invites a petition for rehearing." But there is no reason to fix the expiration of the 25-day period, rather than the expiration of the term of the Court, as the time when the Court's order becomes final, since both by its rules and practice the Court allows rehearings on good cause shown at any time during the term.

There are several cases involving the Board's power to reconsider its decisions. *Burnet v. Lexington Ice & Coal Co.*, 62 F. 2d 906 (C. C. A. 4th), and *Griffiths v. Commissioner*, 50 F. 2d 782, 784 (C. C. A. 7th), presented situations where the Board's rules set no time limit for petitions for rehearing, and petitions for rehearing were filed within the statutory period for petition for review by the circuit court of appeals. It was held that the time for filing such petition for review by the circuit court of appeals did not expire until the Board had disposed of the motion for rehearing. Cf. *Denholm & McKay Co. v. Commissioner*, 132 F. 2d 243 (C. C. A. 1st); *Swall v. Commissioner*, 122 F. 2d 324 (C. C. A. 9th), certiorari denied, 314 U. S.

697; *La Floridienne J. Buttgenbach & Co. v. Commissioner*, 63 F. 2d 630 (C. C. A. 5th).⁴

Practical considerations.—If the statute be construed as we suggest, the consequence will be that a petition for certiorari will not be deemed denied, under subsection (b) (2), until the expiration of the term of this Court at which the petition is rejected in the first instance. There remains for consideration the question whether there are any reasons of policy particularly applicable to cases coming from the Board of Tax Appeals which militate against such an interpretation.

Income taxes must, by Internal Revenue Code, Section 275, be assessed within three years after the return is filed. But where the taxpayer asks reconsideration by the Board of the Commissioner's deficiency letter, the Commissioner is by Section 272 prohibited from making an assessment "until the decision of the Board has become

⁴In *Bankers Coal Co. v. Burnet*, 287 U. S. 308, 313, this Court assumed that the Board had power to grant rehearings and vacate its prior decisions. And see *John Thomas Smith v. Commissioner*, 42 B. T. A. 505, reversed on other grounds, 136 F. 2d 556 (C. C. A. 2d). In this case the Board recently asserted a power to vacate its earlier decision before the taking of an appeal and before the time for appeal had expired.

The Circuit Court of Appeals for the Second Circuit has suggested the possibility that the Board of Tax Appeals has authority to reopen a case decided more than ten years before (*Monjar v. Higgins*, 132 F. 2d 990, 994). The subsequent history of this case shows that a motion to reopen was thereupon filed with the Tax Court of the United States, Docket No. 47094. The motion was denied on May 11, 1943, and the case is now pending on appeal (*Hugh B. Monjar v. Commissioner* (C. C. A. 2d)).

final." During this period, however, the statute of limitations on the making of assessments is suspended. Internal Revenue Code, Section 277. (*Supra*, pp. 11-12.) Since notices of deficiency under Section 272 of the Code frequently cannot be mailed until considerable time after the taxpayer has filed his return, and a goodly portion of the statute of limitations has expired, there is undoubtedly considerable importance in fixing exactly the date when the Board's decision becomes final. The Commissioner needs to know when he is at liberty to make an assessment and when the statute of limitations again starts running. However, it should be noticed that Internal Revenue Code, Section 1140 (b) (2), here involved, applies only to those cases where the circuit court of appeals has affirmed a decision of the Board and a petition for certiorari is denied by the Supreme Court. We may assume a case where the Board has affirmed the Commissioner's determination of a deficiency and the taxpayer has appealed to the circuit court of appeals. Then, in spite of the provision of Section 272, *supra*, by the express provision of the Internal Revenue

By Section 273 of the Internal Revenue Code, the Commissioner may make, in spite of this prohibition, a jeopardy assessment if "assessment or collection of a deficiency will be jeopardized by delay." After the decision of the Board is rendered, however, this assessment may be made only for the deficiency determined by the Board.

Similar provisions are contained in the Internal Revenue Code in respect of estate and gift taxes. Sections 871, 872, 874, 875, 1012, 1013, 1016, and 1017.

Code, Section 1145,⁷ the Commissioner may at once assess the deficiency "determined by the Board," unless the taxpayer files his bond "conditioned upon the payment of the deficiency as finally determined." This latter section seemingly reduces in some measure the importance of fixing a precise date for the time when on petition for certiorari the decision of the Board becomes final. In any event, the expiration of the term of this Court at which certiorari was denied in the first instance would likewise furnish a readily ascertainable date of finality, and Section 1145 does mitigate any hazard to the revenues consequent upon the delay of a few months. The Commissioner, if the taxpayer has not filed a bond, may proceed at once to assess and collect the tax or, if a bond has been filed, may have recourse to the bond. The latter may not, it is true, be a satisfactory substitute for the more summary method of assessment and collection provided by the statute. Suit on the bond may even be required. If because bond is not filed the tax is assessed and collected by the Commissioner, and the Board and the circuit court are finally reversed by this Court, then under the Internal Revenue Code, Section 322, a credit or refund is due the taxpayer.⁸

⁷ This section is derived from the corresponding provision of Section 1001 (c), Revenue Act of 1926.

⁸ The tax in the instant case was assessed on Nov. 27, 1942, and paid on Dec. 11, 1942. Thereupon a bonding company

On the other hand, if the Board has expunged a deficiency determined by the Commissioner, and the circuit court of appeals has affirmed, the Commissioner would be the party seeking certiorari from the Supreme Court. If the petition for certiorari is denied, the decision of the Board and the court stands and there is no deficiency to assess. The question whether the statute of limitations on making of assessments runs from the original denial of the petition for the writ or from the action of the Court on petition for rehearing is therefore entirely immaterial.

In either situation, if the petition for certiorari is granted, whether on the original petition, or on the petition for rehearing, then Internal Revenue Code, Section 1140 (b) (2) is no longer applicable and other subsections control the situation, depending upon whether the Court affirms, modifies or reverses the decision below or orders a rehearing.

Balancing the considerations, we believe that the previous practice of this Court in reconsidering denials of certiorari, in Section 1140 cases as well as in other cases, is salutary and in accordance with sound policy. While litigation should, of course, be brought to an end as speedily as possible, the interest of the parties in securing a

was released from liability on an appeal bond. However, this administrative action presents no difficulties, for the Tax Court is authorized to take into account any payments made after the mailing of the deficiency notice. See Sec. 322 (d) of the Internal Revenue Code.

judgment in accord with the authoritative pronouncement of law by the court of last resort is of equal, if not of greater, importance. Rehearings on denials of petitions for certiorari are customarily granted only when there intervenes between the first denial of the writ either a conflict in the circuits or else a decision by this Court inconsistent with the order denying the petition for the writ. In such a situation, if the Court could not redetermine its former action on the petition, the result might well be that the petitioner would be bound by a judgment below contrary to the law declared and applied by the Court in the second case, arising after certiorari was first denied. This unfortunate result is avoided by the judicious application by the Court of its authority to grant rehearings. If possible, in appeals from the decisions of the Board of Tax Appeals, the parties should have the benefit of this practice. There is no danger that the finality of the Board's decision would be indefinitely suspended, since it is well settled that after the term of the Court has ended, its orders and judgments are final and not subject to be reopened.

II

The penalty for failure to file the personal holding company return was correctly assessed

The taxpayer is a "personal holding company" within the meaning of Section 351 of the Revenue Acts of 1934 and 1936 (Appendix, *infra*, pp. 50-51.

53). It filed no personal holding company return for 1934, 1935, or 1936, the years here involved. The question is whether, in consequence of this failure, it was properly subjected to the 25% penalty provided by Sections 291 of the Revenue Acts of 1934 and 1936 and Section 406 of the Revenue Act of 1935 (Appendix, *infra*, pp. 49-50, 52-53).

Prior to the Revenue Act of 1934, personal holding companies, as now, were subject to the regular corporation income taxes under Title I, but there was no express provision taxing them with respect to the excessive accumulation of profits. They were merely subjected, along with all other corporations, to the provisions (*e. g.* Section 104 of the Revenue Act of 1932) imposing an additional tax upon the accumulation of profits where there was present the purpose of avoiding surtaxes upon the shareholders.

Because of the ineffectiveness of these latter provisions in regard to personal holding companies, it was recommended by the House Ways and Means Committee that the Revenue Act of 1934 contain a separate provision for taxing such companies. In H. Rep. No. 704, 73d Cong., 2d Sess., p. 11 (1939-1 Cum. Bull. (Part 2) 554, 562), the following recommendation was made:

Your committee, therefore, recommends that the present section 104 be divided into two parts, one dealing with the personal holding company and the other with all other corporations which accumulate unreasonable

surpluses. The part dealing with personal holding companies is new, while the present law has been retained with a few modifications to reach the other companies. (See Secs. 102 and 103 of the bill.)

In S. Rep. No. 558, 73d Cong., 2d Sess., p. 13 (1939-1 Cum. Bull. (Part 2) 586, 596), the House discussion is quoted and this paragraph follows:

In view of this situation, your committee has rewritten the section dealing with personal holding companies and has placed it in title IA, section 351, and it has been made plain that this is an additional graduated income tax, or surtax, on personal holding companies.

It is further said in this report (p. 15):

The effect of this system is to provide for a tax which will be automatically levied upon the holding company without any necessity for proving a purpose of avoiding surtaxes.

Finally, it is said in the Conference-Report (H. Conference Rep. No. 1385, 73d Cong., 2d Sess., p. 20 (1939-1 Cum. Bull. (Part 2) 627, 630, 631):

Amendment No. 45 strikes out the provision in the House bill providing for a "tax on personal holding companies," and amendment No. 124 substitutes a surtax on personal holding companies for taxable years to which Title I applies. * * *

* * * *The Senate amendment provides for a separate return for the purposes of this surtax on personal holding companies. All provisions of law in respect of the taxes*

imposed by Title I are applicable to this *return*, except that the foreign-tax credit imposed by section 131 is not allowed. [Italics supplied.]

As finally accepted by Congress in 1934, this bill appears as:

TITLE IA—ADDITIONAL INCOME TAXES

SEC. 351. SURTAX ON PERSONAL HOLDING COMPANIES

Although the provisions imposing the personal holding company surtax were contained in Title IA, Congress provided that the same provisions for administering taxes imposed by Title I should also apply to taxes imposed by Title IA. Section 351 (c), Appendix, *infra*, p. 51, of Title IA refers to Title I for those provisions, as follows:

All provisions of law (including penalties) applicable in respect of the taxes imposed by Title I of this Act, shall insofar as not inconsistent with this section, be applicable in respect of the tax imposed by this section, * * *

The very fact that Congress believed some reference to administrative provisions necessary strongly supports the view that the personal holding company tax is to be regarded as a levy wholly separate from the tax imposed by Title I. It is a special income tax, as was the tax involved in *United States v. Hudson*, 299 U. S. 498, but this classification does not prevent it from being a

wholly separate tax. The separation of the Title I and Title IA taxes results in separate deficiencies as defined by Section 271 of the Internal Revenue Code with the consequence that a deficiency notice for only one of the taxes does not confer jurisdiction on the Tax Court to review the liability for the other. Cf. *Will County Title Co. v. Commissioner*, 38 B. T. A. 1396; *Rowan Cotton Mills v. Commissioner*, 1 T. C. 865, pending on appeal C. C. A. 4th, No. 1578; *Lane-Wells Co. v. Commissioner*, 43 B. T. A. 463, 480.

The physical separation under a different title number made it necessary that the new tax be separately implemented by appropriate administrative provisions. This could have been accomplished by a repetition of the administrative provisions of Title I. Congress chose instead to make the latter applicable to Title IA by reference.

Referring to Title I, Section 54 (a), Appendix, *infra*, p. 49, states that every person liable to any tax imposed by this title (*i. e.*, Title IA for our purposes) shall make such returns and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe. And by Section 62, Appendix, *infra*, p. 49, the Commissioner is directed to prescribe and publish "all needful rules and regulations for the enforcement of this title" (*i. e.*, Title IA for our purposes).

The result of making the Title I provisions applicable is plainly the same as though the admin-

istrative provisions had been repeated. The requirement of a return for Title IA taxes is therefore clear, and the Conference Report, previously referred to, makes it apparent that Congress understood that a separate return would be required.⁹ Pursuant to this understanding the Treasury Regulations stated unequivocally:

A separate return is required for the surtax imposed under section 351. Such return shall be made on Form 1120H.

See Regulations 86 and 94, Article 351-8 (Appendix, *infra*, pp. 54-55, 56). The validity of this requirement has been upheld in *Noteman v. Welch*, 108 F. 2d 206 (C. C. A. 1st); *O'Sullivan Rubber Co. v. Commissioner*, 120 F. 2d 845 (C. C. A. 2d); *Lone Pine Lawn Corp. v. Helvering*, 121 F. 2d 935 (C. C. A. 2d); *Logan Coal & Timber Ass'n v. Commissioner*, 122 F. 2d 848 (C. C. A. 3d); *Girard Inv. Co. v. Commissioner*, 122 F. 2d 843 (C. C. A. 3d), certiorari denied, 314 U. S. 699; *Porto Rico Coal Co. v. Commissioner*, 126 F. 2d 212 (C. C. A. 2d).

Also under Title I, Sections 291 of the Revenue Acts of 1934 and 1936, and Section 406 of the Revenue Act of 1935, impose penalties for failure to file the required returns. By force of Section 351 (c), these provisions likewise are applicable to the

⁹ Moreover, Section 407 (f) of the Revenue Act of 1938, which is a part of Title IA, relating to personal holding companies, refers specifically to "failure to file the return under this title," thus recognizing the intent of Congress that a separate return should be made for personal holding companies. See also Internal Revenue Code, Section 506 (f).

personal holding company tax provided by that section. See Regulations 86 and 94, Articles 291-1, 351-8 (Appendix, *infra*, pp. 53-54, 55-56). The lower court decisions last cited have so held.

The taxpayer in this case filed no personal holding company return, either on Form 1120H (R. 28) or otherwise. It did file income- and excess-profits-tax returns on Form 1120 and also information returns on Forms 1096 and 1099 listing the amounts of dividends over \$300 paid to its stockholders. The income- and excess-profits-tax returns apparently disclosed the total interest received in relation to gross income (R. 26). In addition, the taxpayer's books and records were made available to the Commissioner's agents; they gave some indication that more than 50 percent of the taxpayer's stock was owned by less than five persons and disclosed that at least 80 percent of its income was derived from interest (R. 27-28). See Section 351 of the Revenue Acts of 1934 and 1936, which defines a "personal holding company" in terms of the proportion of interest received and the number of stockholders during the last half of its taxable year.

It seems evident that the filing of the income- and excess-profits-tax return on Form 1120 and of the information returns on Forms 1096 and 1099 cannot be considered the equivalent of the filing of the personal holding company return on Form 1120H, even though the Commissioner's agents might by examination of the taxpayer's records have discovered that the taxpayer was a personal

holding company. The federal tax is self-assessed. Its successful administration depends upon the making of accurate and comprehensive returns, from which the agents of the Bureau of Internal Revenue may with reasonable dispatch determine whether the taxpayer has correctly made the assessment provided by law. To assure the making of such returns the Congress in all of the Revenue Acts from 1913 to the present date has imposed penalties for failure to file the returns required by the law, notwithstanding the inquisitorial powers of the Treasury to gain access to taxpayers' books. Section 291 of the Revenue Acts of 1934 and 1936 and Section 406 of the Revenue Act of 1935, involved in this case, are consonant with this prevailing purpose.

The penalty is incurred by the failure of the taxpayer to file the required return. Where there is such a failure, the undisclosed tax remains unknown until the efforts of Government officials bring it to light. The argument that the availability of the information to Government officials avoids the penalty leads to the incongruous result that the penalty can never be incurred except where the information as to the character of the taxpayer's activities and the items of its income is beyond the Government's reach. But in that case there would never be any occasion for the Government to claim the penalty, and thus the argument would completely nullify the penalty provision. If the argument is limited to an avoidance of the penalty where the taxpayer gives

the Government officials a "lead," the answer is that Congress was not satisfied with a "lead" but required the taxpayer to file a separate return and imposed the penalty for its omission.¹⁰ The burden of making a return from which the tax may be calculated and assessed rests by law upon the taxpayer and not upon the Commissioner. It does not shift to the Commissioner merely because he may have grounds for suspicion that the taxpayer may be subject to an unreported tax and may through recourse to the taxpayer's records have been able to calculate the tax. So to shift the burden of report and assessment to the Commissioner would render the administration of the Act impossible.¹¹

¹⁰ The penalty is one of the civil sanctions designed to ensure a full and honest disclosure by the taxpayer. *Helvering v. Mitchell*, 303 U. S. 391, 399, 405.

¹¹ In the present case the return by the taxpayer of its income on Form 1120 did not indicate that the taxpayer was a personal holding company under the statute. While the income-tax returns apparently did show that 80% of taxpayer's income was derived from interest, they would not disclose that for the last half of the taxable year more than 50% in value of its outstanding stock was held by not more than five persons. Information returns on Forms 1096 and 1099 would disclose only the stockholders who received more than \$300 in dividends during the entire calendar year. These returns in the aggregate would not necessarily convey the information that the taxpayer was a personal holding company, and we do not understand taxpayer to contend that they in fact did so.

Furthermore, the return on Form 1120 is filed with the collector of the district of the taxpayer, and the information returns are by directions on their face mailed to the Com-

Moreover, even assuming, *arguendo*, that the Commissioner was on notice that the taxpayer was a personal holding company, the returns actually filed would not enable him to compute the personal holding company surtax. A comparison of Forms 1120 and 1120H shows the different types of information required in the two cases. For example, certain taxes, contributions, and amounts used or set aside to retire indebtedness incurred prior to January 1, 1934, are not taken into account in determining the net taxable income on Form 1120, but may be taken as deductions against that income in determining the personal holding company surtax on Form 1120H. (See Section 351 (a) and (b).) Some of this information might possibly be ferreted out from the balance sheets and reconciliation statements attached to Form 1120, but it would not be broken down in the required manner. Such schedules are, of course, not prepared for the purpose of computing a personal holding company surtax.

It is true that it has been held that a return, though on a wrong form, which discloses the information by which the Commissioner is notified

missioner of Internal Revenue, Sorting Division, in Washington, and are there filed with the returns of the individual stockholders and not with the returns of the corporation making the payments. Since these two types of returns are not brought together in one place, they do not, in any event, fairly put the Commissioner upon notice that the taxpayer is a personal holding company.

that the tax is due and can determine the tax, may satisfy the various statutes and regulations which require that a "return" be filed. But the distinction between a wrong form and a mere "lead" is one of substance. Thus the holding in *German-town Trust Co. v. Commissioner*, 309 U. S. 304, that a wrong form satisfied the statute is inapposite. There a corporation which invested as trustee the funds of a large number of beneficiaries filed with the Commissioner a fiduciary return on Form 1041 instead of corporation income tax return on Form 1120. The Commissioner assessed a corporate income tax against the corporation under Section 1111 (a) (2) of the Revenue Act of 1932. This Court held that the trust return was a sufficient "return" under Section 275 (a) of the Revenue Act of 1932, requiring that the tax "shall be assessed within two years after the return was filed." In so holding the Court said (p. 308) that the fiduciary return on Form 1041 "contained all of the data from which a tax could be computed and assessed although it did not purport to state any amount due as tax." While the "return may have been incomplete in that it failed to compute a tax * * * this defect falls short of rendering it no return whatever" (p. 310). If, however, the return filed does not contain the data from which the tax may be computed, then it does not comply with the statutory requirement of a return. Thus, *Florsheim Bros. Co. v. United States*, 280 U. S. 453, held that a tentative return

of income, which contained only an estimate of the taxes due, although authorized by the Commissioner, was not a "return" sufficient to start the limitations of the statute running. The Court in that case said (p. 460):

The burden of supplying by the return the information on which assessments were to be based was thus imposed upon the taxpayer. And, in providing that the period of limitation should begin on the date when the return was filed, rather than when it was due, the statute plainly manifested a purpose that the period was to commence only when the taxpayer had supplied this information in the prescribed manner.¹²

¹²To the same effect see *John D. Alkire Inv. Co. v. Nicholas*, 114 F. 2d 607, 610 (C. C. A. 10th):

"* * * a return which fails to comply in a substantial degree with the requirements of the statute in respect to disclosing the requisite information essential to the making of assessments does not suffice to start the period of limitation."

See also *National Contracting Co. v. Commissioner*, 105 F. 2d 488 (C. C. A. 8th), a similar case; *Paso Robles Mercantile Co. v. Commissioner*, 33 F. 2d 653 (C. C. A. 9th), certiorari denied, 280 U. S. 595; *United States v. National Tank and Export Co.*, 45 F. 2d 1005 (C. C. A. 5th), certiorari denied, 283 U. S. 839; *National Shirt Shops v. United States*, 57 F. 2d 925 (C. Cls.), certiorari denied, 287 U. S. 633 (returns not covering entire tax year); *Cem Securities Corp. v. Commissioner*, 72 F. 2d 295, 298 (C. C. A. 4th), certiorari denied, 293 U. S. 613 (corporation had taken over business of another corporation filing single return for both corporations instead of separate returns for each); *Commissioner v. Krein Chain Co.*, 72 F. 2d 424 (C. C. A. 6th) (individual corporation return insufficient when consolidated returns required).

Under these tests, it is manifest that the returns filed by the instant taxpayer cannot be considered the equivalent of the required returns on Form 1120H.

With the exception of the recent decision in *Lane-Wells Co. v. Commissioner*, 134 F. 2d 977 (C. C. A. 9th), No. 115, this Term, it has been uniformly held in the circuit courts of appeals that a taxpayer who fails to file a personal holding company return on Form 1120H, even though a corporation income-tax return on Form 1120 has been filed, is subject to the prescribed statutory penalties for failure to file a return. *Noteman v. Welch*, 108 F. 2d 206 (C. C. A. 1st); *O'Sullivan Rubber Co. v. Commissioner*, 120 F. 2d 845 (C. C. A. 2d); *Lone Pine Lawn Corp. v. Helvering*, 121 F. 2d 935 (C. C. A. 2d); *Logan Coal & Timber Ass'n v. Helvering*, 122 F. 2d 848 (C. C. A. 3d); *Girard Inv. Co. v. Commissioner*, 122 F. 2d 843 (C. C. A. 3d), certiorari denied, 314 U. S. 699; *Porto Rico Coal Co. v. Commissioner*, 126 F. 2d 212 (C. C. A. 2d). Cf. *Blenheim Co. v. Commissioner*, 125 F. 2d 906 (C. C. A. 4th), holding that the filing of the personal holding company return did not prevent the application of the statutory penalty for failure to file the ordinary corporation tax return on Form 1120.

The court in the *Lane-Wells* case, *supra*, relied mainly upon the decision of this Court in *German-town Trust Co. v. Commissioner*, 309 U. S. 304. But, as we have seen, the decision in that case is

not applicable here. In the first place the return in that case contained all the data necessary for the assessment of the tax by the Commissioner. In the present case the return which was filed was insufficient to advise the Commissioner that any liability existed for the personal holding company tax. The disclosure of liability is one of the principal reasons for requiring a return and we submit that a purported return omitting such critical information is an insufficient compliance with the statute.

Secondly, the *Germantown Trust Co.* case did not involve the statute imposing penalties for failure to file the prescribed return but the statute of limitations on making assessments. The statute here involved is for the express purpose of requiring the taxpayer to file the return prescribed by the regulations. If this statute may be avoided by the filing of some other type of return, then the authority of the Commissioner to prescribe specific forms becomes nugatory. Further, in that case the Commissioner did not specifically prescribe that two returns be filed. The taxpayer filed a return containing all the data necessary for the assessment of the tax, but by mistake used a wrong form. In the instant case the Commissioner prescribed two separate returns, one for income and excess profits, and one for the personal holding company surtax. The filing of both forms was essential to a proper return of the tax liability. The Bureau of Internal Revenue is an

organization of great magnitude, handling the returns of millions of taxpayers. The administration of this vast business requires careful and detailed planning in order that the various types of taxes under its jurisdiction may properly be assessed. The organization of the Bureau is conditioned in advance on the filing by the taxpayer of separate forms of returns for separate types of taxes. Two such forms of returns were required in the instant case. Only one was filed. The Regulations of the Commissioner and of the Secretary were positively and clearly violated. This, it is submitted, is an entirely different matter from the mere filing of a wrong form of return, as was involved in the *Germantown Trust Co.* case.

In addition, it should be pointed out that in the *Germantown Trust Co.* case the taxes to be assessed were all assessable under Title I of the Revenue Act of 1932, whether under the trust provisions of Sections 161-162 or under the corporation tax provisions of Sections 13 and 1111 (a) (2). The personal holding company surtax under Section 351 of the 1934 and 1936 Acts is, however, an entirely separate tax under the separate Title IA of the Revenue Acts and is "in addition to, the taxes imposed by Title I."¹³ A return of the corporate income and excess-profits

¹³ Revenue Act of 1936, c. 690, 49 Stat. 1648, Section 351 (a). See also S. Rep. No. 558, 73rd Cong., 2d Sess., p. 13 (1939-1 Cum. Bull. (Part 2) 586, 596), *supra*, p. 30.

tax under Title I cannot in any sense, therefore, be considered a return of the personal holding company surtax under Section 351 of Title IA, and for failure to file the latter return the taxpayer is clearly subject to the statutory penalties.

A similar situation was presented with respect to returns of income under Title I of the Revenue Acts of 1916 and of October 3, 1917, and returns of war excess profits under Section 201, Title II, of the Revenue Act of October 3, 1917. Section 212 of Title II of the 1917 Act, like Section 351 (c) of the Acts of 1934 and 1936, made applicable to the excess profits tax the administrative provisions of the income tax, and the Commissioner, as under the acts here involved, provided for separate returns for the two types of taxes. In *Beam v. Hamilton*, 289 Fed. 9 (C. C. A. 6th), it was held that the failure of the taxpayer to file the excess profits tax return, in spite of the fact that a return for the ordinary income tax was duly filed, subjected him to the statutory penalty for failure to file returns. The statement of the court in reference to the income and to the excess profits tax is equally applicable to the ordinary income and personal holding company taxes here involved. It said (p. 14):

Not only was the excess profits tax a separate, distinct, and then novel source of revenue, but the statute and regulations, as we have above shown, in express and formal terms required separate and distinct returns thereof, and we think it clear that failure to make a separate return of

excess-profits tax is nonetheless a failure to make the return contemplated by the statute because of the mere fact that the computations on the excess profits return are to be carried onto Form 1040; the use of that form also is necessary to a complete report. By section 213 the Commissioner was undoubtedly given authority, with the approval of the Secretary of the Treasury, to require both returns.

This case was followed in *Updike v. United States*, 8 F. 2d 913 (C. C. A. 8th), certiorari denied, 271 U. S. 661; *McDonnell v. United States*, 59 F. 2d 295 (C. Cls.), certiorari denied, 287 U. S. 648; *Atterbury v. United States*, 59 F. 2d 300 (C. Cls.); *Commissioner v. National Land & Const. Co.* 70 F. 2d 349 (C. C. A. 6th).

The taxpayer in the instant case was required, then, to make a return for the personal holding company surtax on Form 1120H. It made no such return or any other return from which the Commissioner could calculate and assess the tax. For such failure, Sections 291 of the Revenue Acts of 1934 and 1936, respectively, and Section 406 of the Revenue Act of 1935, prescribed the penalty assessed in this case. In respect to the Acts of 1934 and 1935, the assessment of the penalty is clearly mandatory. Section 291 of the 1934 Act provided that "In case of any failure to make and file a return * * * 25 per centum of the tax shall be added to the tax." It is only when a return is filed tardily that the taxpayer may be relieved of the penalty by showing that the delay

was "due to reasonable cause and not due to willful neglect." Section 406 of the 1935 Act, changing the amount of the penalty for tardy filing, makes the mandatory feature of the statute if anything more certain. Without any conflict whatsoever, this has been the uniform holding in the circuit courts of appeals. *Scranton-Lackawanna T. Co. v. Commissioner*, 80 F. 2d 519 (C. C. A. 3d), certiorari denied, 297 U. S. 723; *Edmonds v. Commissioner*, 90 F. 2d 14 (C. C. A. 9th), certiorari denied, 302 U. S. 713; *Fidelity & Columbia T. Co. v. Commissioner*, 90 F. 2d 219 (C. C. A. 6th), certiorari denied, 302 U. S. 723; *National Contracting Co. v. Commissioner*, 105 F. 2d 488, 492 (C. C. A. 8th); *Uhl Estate Co. v. Commissioner*, 116 F. 2d 403 (C. C. A. 9th); *Plunkett v. Commissioner*, 118 F. 2d 644 (C. C. A. 1st); *O'Sullivan Rubber Co. v. Commissioner*, 120 F. 2d 845 (C. C. A. 2d); *Logan Coal & Timber Ass'n v. Helvering*, 122 F. 2d 848 (C. C. A. 3d); *Lone Pine Lawn Corp. v. Helvering*, 121 F. 2d 935 (C. C. A. 2d); *Calafato v. Commissioner*, 124 F. 2d 187 (C. C. A. 3d).

Section 291 of the 1936 Act apparently permits relief from the penalty provisions for failure to file, as well as for tardy filing of returns, if the same is "due to reasonable cause and not due to willful neglect." In respect to that year, however, the Board of Tax Appeals held that the taxpayer had not shown the requisite reasonable cause. The personal holding company ~~surtax~~ tax law

had then been in effect for three years and the taxpayer had been advised through the corporation income tax forms filed by it of its duty to file the personal holding company return. Nothing made it impossible for the taxpayer to comply with this requirement. A full disclosure, accompanied if desired by a disclaimer of liability, would have avoided the penalty and preserved to the taxpayer every right to test the merits of its position. The mere fact that the taxpayer erroneously believed it was not a personal holding company could not be the "reasonable cause" necessary to excuse it from the statutory penalty. At the least, this determination of the Board, which heard all the testimony in the case, including that of the officer who made the tax return for the taxpayer corporation, is reasonable and for that reason should not be disturbed.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

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APPENDIX

Internal Revenue Code:

SEC. 1140. DATE WHEN BOARD DECISION BECOMES FINAL.

The decision of the Board shall become final—

(a) *Petition for Review Not Filed on Time.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(b) *Decision Affirmed or Petition for Review Dismissed.*—

(1) *Petition for certiorari not filed on time.*—Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals and no petition for certiorari has been duly filed; or

(2) *Petition for certiorari denied.*—Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

(3) *After mandate of Supreme Court.*—Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.

(c) *Decision Modified or Reversed.*—

(1) *Upon mandate of Supreme Court.*—

If the Supreme Court directs that the decision of the Board be modified or reversed, the decision of the Board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(2) *Upon mandate of the Circuit Court of Appeals.*—If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(d) *Rehearing.*—If the Supreme Court orders a rehearing; or if the case is remanded by the Circuit Court of Appeals to the Board for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the de-

cision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered upon such rehearing shall become final in the same manner as though no prior decision of the Board had been rendered.

(e) *Definitions*.—As used in this section—

(1) *Circuit Court of Appeals*.—The term “Circuit Court of Appeals” includes the United States Court of Appeals for the District of Columbia;

(2) *Mandate*.—The term “mandate,” in case a mandate has been recalled prior to the expiration of 30 days from the date of issuance thereof, means the final mandate. (U. S. C. 1940 ed., Title 26, Sec. 1140.)

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 54. RECORDS AND SPECIAL RETURNS.

(a) *By Taxpayer*.—Every person liable to any tax imposed by this title or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

* * * *

SEC. 62. RULES AND REGULATIONS.

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

* * * *

SEC. 291. FAILURE TO FILE RETURN.

In case of any failure to make and file a return required by this title, within the time prescribed by law or prescribed by the Commissioner in pursuance of law; 25 per centum of the tax shall be added to the tax,

except that when a return is filed after such time and it is shown that the failure to file it was due to reasonable cause and not due to willful neglect no such addition shall be made to the tax. The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax. The amount added to the tax under this section shall be in lieu of the 25 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

* * * * *

SEC. 351. SURTAX ON PERSONAL HOLDING COMPANIES.

(a) *Imposition of Tax.*—There shall be levied, collected, and paid, for each taxable year, upon the undistributed adjusted net income of every personal holding company a surtax equal to the sum of the following:

* * * * *

(b) *Definitions.*—As used in this title—

(1) The term “personal holding company” means any corporation * * * if—(A) at least 80 per centum of its gross income for the taxable year is derived from royalties, dividends, interest, annuities, and (except in the case of regular dealers in stock or securities) gains from the sale of stock or securities; and (B) at any time during the last half of the taxable year more than 50 per centum in value of its outstanding stock is owned, directly or indirectly, by or for not more than five individuals. * * *

(2) The term “undistributed adjusted net income” means the adjusted net income minus the sum of:

(A) 20 per centum of the excess of the adjusted net income over the amount of dividends received from personal holding companies which are allowable as a deduction for the purposes of the tax imposed by section 13 or 204;

(B) Amounts used or set aside to retire indebtedness incurred prior to January 1, 1934, if such amounts are reasonable with reference to the size and terms of such indebtedness; and

(C) Dividends paid during the taxable year.

(3) The term "adjusted net income" means the net income computed without the allowance of the dividend deduction otherwise allowable, but minus the sum of:

(A) Federal income, war-profits, and excess-profits taxes paid or accrued, but not including the tax imposed by this section;

(B) Contributions or gifts, not otherwise allowed as a deduction, to or for the use of donees described in section 23 (c) for the purposes therein specified; and

(C) Losses from sales or exchanges of capital assets which are disallowed as a deduction by section 117 (d).

(4) The terms used in this section shall have the same meaning as when used in Title I.

(c) *Administrative Provisions.*—All provisions of law (including penalties) applicable in respect of the taxes imposed by Title I of this Act, shall insofar as not inconsistent with this section, be applicable in respect of the tax imposed by this section, except that the provisions of section 131 of that title shall not be applicable.

* * * * *

Revenue Act of 1935, c. 829, 49 Stat. 1014:

SEC. 406. FAILURE TO FILE RETURNS.

In the case of a failure to make and file an internal-revenue tax return required by law, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, if the last date so prescribed for filing the return is after the date of the enactment of this Act, if a 25 per centum addition to the tax is prescribed by existing law, then there shall be added to the tax, in lieu of such 25 per centum: 5 per centum if the failure is for not more than 30 days, with an additional 5 per centum for each additional 30 days or fraction thereof during which failure continues, not to exceed 25 per centum in the aggregate.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 291. FAILURE TO FILE RETURN.

In case of any failure to make and file return required by this title, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the tax 5 per centum if the failure is for not more than thirty days with an additional 5 per centum for each additional thirty days or fraction thereof during which such failure continues, not exceeding 25 per centum in the aggregate. The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax. The amount added to the tax under this section shall

be in lieu of the 25 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

Sections 54 (a) and 62 of the Revenue Act of 1936 are identical with the same numbered sections of the Revenue Act of 1934; and Section 351 is, as far as the question presented in this case is concerned, substantially identical with Section 351 of the Revenue Act of 1934.

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

Art. 291-1. Addition to the tax in case of failure to file return.—In case of failure to make and file a return required by Title I within the prescribed time, 25 percent of the amount of the tax is added to the tax unless the return is later filed and failure to file the return within the prescribed time is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect. Two classes of delinquents are subject to this addition to the tax:

(a) Those who do not file returns and for whom returns are made by a collector or the Commissioner, and

(b) Those who file tardy returns and are unable to show reasonable cause for the delay.

A taxpayer who files a tardy return and wishes to avoid the addition to the tax must make an affirmative showing of all facts alleged as a reasonable cause for failure to file the return on time in the form of an affidavit which should be attached to the return. If such an affidavit is furnished with the return or upon the collector's demand, the collector, unless otherwise di-

rected by the Commissioner, will forward the affidavit with the return, and, if the Commissioner determines that the delinquency was due to a reasonable cause and not to willful neglect, the 25 percent addition to the tax will not be assessed. If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return in the prescribed time, then the delay is due to reasonable cause.

If the 25 percent addition to the tax for delinquency in filing the return has been added, the amount so added shall be collected in the same manner as the tax.

* * * * *

This article was amended by T. D. 4626, XV-1 Cum. Bull. 61, 76-77 (1936), to conform with the changes in the amount of the penalty for tardy returns prescribed by Section 405 of the Revenue Act of 1935. Since no personal holding company return was filed at all by the taxpayer in this case, the amendments are immaterial to the question here presented.

Art. 351-1. Surtax on personal holding companies.—Section 351 of Title IA imposes an additional graduated income tax or surtax upon corporations classified as personal holding companies. * * *

* * * * *

Art. 351-8. Return and payment of tax.—A separate return is required for the surtax imposed under section 351. Such return shall be made on Form 1120H. * * * The penalties applicable to the income taxes imposed under Title I, as well as the provisions of Title I relating to interest and additions to the tax, also apply to the surtax imposed by section 351. The administrative provisions applicable

to the surtax imposed by section 351 are not confined to those contained in Title I but embrace all administrative provisions of law which have any application to income taxes.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

Art. 291-1' (as amended by T. D. 5058, 1941-2 Cum. Bull. 156). *Addition to the tax in case of failure to file return.*—In case of failure to make and file a return required by Title I within the prescribed time, a certain percent of the amount of the tax is added to the tax unless failure to file the return within the prescribed time is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect. The amount to be added to the tax is 5 percent if the failure is for not more than 30 days, with an additional 5 percent for each additional 30 days or fraction thereof during which failure continues, not to exceed 25 percent in the aggregate.

A taxpayer who wishes to avoid the addition to the tax for delinquency must make an affirmative showing of all facts alleged as a reasonable cause for failure to file the return on time in the form of an affidavit which should be filed with the collector, who, unless otherwise directed by the Commissioner, will forward the affidavit to the Commissioner, and, if the Commissioner determines that the delinquency was due to a reasonable cause, and not to willful neglect, the addition to the tax will not be assessed. If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file

the return within the prescribed time, then the delay is due to a reasonable cause.

If the addition to the tax for delinquency in filing the return has been added, the amount so added shall be collected in the same manner as the tax.

Article 351-1 and 351-8 of Treasury Regulations 94 are, as far as the issues of this case are concerned, identical with the same numbered articles in Regulations 86.